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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,)	No. P1300CR20081339
)	
Plaintiff,)	Div. 6
)	
vs.)	OPPOSITION TO STATE'S LATE
)	DISCLOSURE AND FAILURE TO
STEVEN CARROLL DEMOCKER,)	COMPLY WITH ARIZONA
)	RULE OF CRIMINAL
Defendant.)	PROCEDURE 15.6
)	
)	
)	

Steven DeMocker, by and through counsel, hereby respectfully requests that the Court preclude the State from offering late disclosed witnesses, experts and evidence at trial because of the State's failure to comply with Arizona Rule of Criminal Procedure 15.6. This motion is based on the due process clause, the Eighth Amendment and

1 Arizona counterparts, Arizona Rules of Evidence, Arizona Rules of Criminal Procedure
2 and the following Memorandum of Points and Authorities.

3 **I. HISTORY OF THE STATE'S FAILURE TO COMPLY WITH RULE 15**
4 **AND THIS COURT'S ORDERS REGARDING DISCLOSURE.**

5 The defense has repeatedly detailed the State's failures to comply with Rule 15
6 and the Court's orders regarding disclosure. The Court dismissed two death penalty
7 aggravators on April 8, 2010, as a sanction for the State's conduct. Thereafter, the State
8 continued to violate the Rule and the Court's orders. On April 28, the Court heard
9 argument on the defense motion to preclude late disclosed experts, witnesses and
10 evidence from the State's 55-57th supplemental disclosures. The Court precluded
11 witnesses and evidence on the basis of the State's discovery violations. On April 29,
12 2010, the defense filed an additional Motion to Preclude late disclosed evidence,
13 witnesses and exhibits from the State's 59th-62d supplemental disclosures. The Court
14 heard argument on the motion and again precluded witnesses and evidence. See May
15 11, 2010 Minute Entry. On April 28, the Court reminded the State that if it did not
16 comply with Rule 15.6, it would not be permitted to use late disclosed evidence at trial.

17 Trial started on May 4, 2010 with jury selection. Pursuant to Arizona Rule of
18 Criminal Procedure 15.6(b), if a party determines that additional disclosure may be
19 forthcoming within thirty (30) days of trial, it is to notify the court and other parties
20 "immediately" of the circumstances and when the disclosure will be available. Section
21 (d) of the same rule provides that if a party seeks to use material that was not disclosed
22 seven (7) days prior to trial, the party must file a motion and affidavit seeking leave of
23 court to use the material or information. The Court may either grant or deny the motion.
24 If the Court grants the motion, the Court may also issue sanctions. In considering
25 whether to grant the motion, the Court is to consider whether "the material or
26 information could not have been discovered or disclosed earlier even with due diligence
27 and the material or information was disclosed immediately upon its discovery."
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1 The State has violated both subsection (c) and (d) of this Rule. On July 1, the
2 State filed a "Notice" of late disclosure listing some, but not all, of the evidence it late
3 disclosed to the defense on that same day. This does not comply with Rule 15.6(c)'s
4 requirement to "immediately" notify the party and the Court once a party determines
5 that disclosure may be forthcoming. Obviously, the State knew before the day of the
6 disclosure that the evidence would be forthcoming. Nonetheless, the State did not
7 comply with the requirement that it immediately notify the Court and the defense of the
8 circumstances and when the disclosure would be made available. Instead, the State
9 waited until the day of the disclosure to provide any notice.

10 The State also did not file a motion pursuant to 15.6(d) seeking leave to use the
11 11 late disclosed witnesses or the over 500 pages of late disclosure and 6 late disclosed
12 CDs at trial until after 5:00 on July 7. The State did file an affidavit but did not attest in
13 the affidavit or state in the motion, because it is not true, that "the material or
14 information could not have been discovered or disclosed earlier even with due diligence
15 and the material or information was disclosed immediately upon its discovery."

16 **II. The Late Disclosed Evidence**

17 **A. Witnesses**

18 The State's 69th supplemental disclosure identifies 11 new lay witnesses and two
19 additional witnesses, for a total of 13 were identified in an addendum to its witness list
20 filed by the State after 5:00 on July 7. Nine of these witnesses were incarcerated at
21 some point with Mr. DeMocker and have been known to the State since a July 2009
22 interview between the State and Mr. DeMocker. One of these witnesses (Mr.
23 Kalmback) was previously disclosed as a witness by the State and precluded by the
24 Court in a May 11, 2010 Minute Entry. For six of these witnesses, the State has not
25 disclosed any interview or indication of how the witnesses' testimony might be relevant.
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1 The other witnesses were interviewed by the State in March and April, 2010 and yet not
2 disclosed as witnesses until July 1.

3 These witnesses could have been and were discovered a year ago by the State but
4 were not disclosed as witnesses immediately upon discovery. Nor has the State
5 described how this evidence is in any way relevant under Rules 401 and 402. For most
6 of these witnesses, the defense has been provided no interviews or other information to
7 conduct an investigation or determine what these witnesses might be called to say.
8 These witnesses should be precluded based on the State's violation of Rule 15.6(c) and
9 (d) and pursuant to Rules 401 and 402.

10 Another late disclosed witness is Joseph Clark of Netlan Café. Mr. Clark was
11 interviewed by the State on July 10, 2009. He was not identified as a witness until July
12 1, 2010, a full year later. Mr. Clark was not disclosed as a witness immediately upon
13 discovery. Therefore, he should be precluded under Rule 15.6(c) and (d). There is also
14 no showing of relevance under Rules 401 and 402 for Mr. Clark's testimony. He owns
15 an internet café from which an email was sent to Mr. Sears and attempted to be sent to
16 Mr. Butner. The State should be precluded from calling Mr. Clark under Rule 401 and
17 402 as well.

18 The State also inexplicably identified defense DNA expert Dr. Norah Rudin as a
19 State's expert in its 69th Supplemental disclosure. Dr. Rudin was identified as a defense
20 expert in February 2010. The State has disclosed no fewer than 10 DNA experts prior
21 to its latest identification of Dr. Rudin as a State's expert. There is no excuse for the
22 State's late disclosure of Dr. Rudin nor any rationale for why it now needs an *eleventh*
23 expert on DNA. The State offers no reason why Dr. Rudin is being disclosed at this late
24 date – when trial is well underway. The State should not be permitted to call Dr. Rudin
25 as an expert pursuant to Rule 15.6.
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1 In it's pleading filed on July 7, the State identifies two attorneys Dan Wilson and
2 Robert Schmitt whom the State characterizes as civil attorneys for Mr. DeMocker
3 facilitating settlement of the Hartford life insurance policies. Theses witnesses were not
4 identified in the State's July 1 69th Supplemental disclosure. There have been no
5 interviews of these witnesses disclosed by the State. Again, the State has been aware of
6 these life insurance policies for two years. These witnesses are disclosed in violation of
7 Rule 15.6. In addition, any evidence about the settlement of the life insurance policies
8 is not relevant and would violate Rule 403 based on its potential to mislead, confuse and
9 prejudice the jury given the lack of any probative value.

10 Finally, the State has again identified Mr. Sears, counsel for Mr. DeMocker, as a
11 witness. This is the State's second attempt to identify Mr. Sears as a witness. The
12 Court denied the first attempt as it related to the golf club head cover. The State's
13 newest late disclosure identifies Mr. Sears as a witness regarding the "voice in the
14 vent." This topic concerns an interview the State conducted with Mr. DeMocker, with
15 Mr. Sears present. County Attorney's Office investigators were also present, as was
16 Mr. Butner and Mr. Sears was acting as counsel to Mr. DeMocker. The State was aware
17 of Mr. Sears' knowledge of these events as of July of 2009. Independent of the
18 potential confidentiality and privilege issues, the State has not complied with Rule 15.6
19 with respect to identifying Mr. Sears as a witness and it should be precluded from
20 calling Mr. Sears on that basis alone.

21 **B. Documents**

22 The State late disclosed over 500 pages of documents on July 1, 2010, in
23 violation of Rule 15.6. Sixty-eight of the pages (25727-25795) were previously
24 disclosed with a different bates number range and will not be addressed here.

25 The State's motion makes clear that it is trying to put the irrelevant, confidential
26 and potentially highly prejudicial issue of payment of Mr. DeMocker's attorneys fees
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1 before this jury. Notwithstanding the fact that the State's pleading has the facts
2 incorrect, this issue is not relevant, not timely disclosed and should be precluded under
3 both Rule 15.6 and Rules of Evidence 401, 402 and 403.

4 *1. Bank of America Records (25796-25821)*

5 The Bank of America records (25796-25821) relate to the estate of Carol
6 Kennedy and this account has been known to the State since October of 2008. The
7 State has provided no 15.6(c) notice nor has it explained why this disclosure is being
8 made two months after the commencement of trial. Furthermore, the estate records of
9 Ms. Kennedy are not relevant and should be excluded pursuant to Rule 401 and 402.

10 *2. Pittsford Federal Credit Union (25828-25844)*

11 The State has disclosed Pittsford Federal Credit Union documents (25828-25844)
12 relating to account records for Mr. DeMocker's mother. These documents include
13 cancelled checks to Mr. DeMocker's counsel from October of 2009. There is absolutely
14 no reason that these documents are relevant, not to mention the issues of attorney-client
15 privilege and confidentiality. In addition, there is no reason why the State is disclosing
16 these two months after the commencement of trial. These documents should be
17 precluded under Rule 15.6 and Arizona Rules of Evidence 401 and 402. If the Court is
18 not included to preclude these documents on this basis, counsel request an in camera, ex
19 parte hearing with the Court to address the sensitive issues of confidentiality and
20 privilege attendant to these records.

21 *3. Hartford Life Insurance File (25845-26214)*

22 The State has known about the relevant Hartford Life Insurance policies since
23 July of 2008. In Court this week—now more than 2 years after the homicide-- the State
24 attempted to excuse this late disclosure by claiming that it had just learned of the payout
25 of the life insurance policies to Ms. Kennedy's daughters during opening statements on
26 June 3. This does not excuse this late disclosure or make these documents relevant to
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1 the trial. The State has known about the existence of these policies for two years. The
2 State's failure to properly inquire of Hartford does not make the disclosure unable to be
3 discovered with due diligence, which is the test under Rule 15.6(d), nor does it excuse
4 the State's failure to immediately notify the Court and counsel under Rule 15.6(c).
5 Furthermore, the fact that these policies were paid out to Ms. Kennedy's daughters is
6 not relevant under Rules 401 and 402. These documents should be precluded on these
7 grounds.
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10 **CDs**

11 *1. Jail Calls*

12 The State disclosed two CDs of May 2010 jail calls on July 1, 2010. The Court
13 previously ordered that all jail calls be disclosed within three days or they would be
14 precluded. See April 13, 2010 Minute Entry. The State has obviously failed to comply
15 with this deadline. Also, the State does not explain how disclosure of calls from two
16 months ago complies with the immediate disclosure and due diligence requirement of
17 15.6(d). These calls should be precluded on the grounds of the Court's prior order and
18 Rule 15.6.

19 *2. CD of Jim Knapp Computer Examination*

20 The State disclosed a CD of the Knapp Computer Analysis on July 1, 2010. The
21 affidavit filed by the State indicates that this exam was "just completed." However, the
22 State disclosed a CD labeled Knapp Computer Analysis in April of 2010. Counsel
23 request clarification as to whether the July CD is a new analysis and differs from the
24 April 2010 analysis. Counsel interviewed the State's expert who performed this
25 examination who indicated that this examination was complete with the earlier report.
26 If this is a new analysis, counsel will file the appropriate objections.
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1 The State has late disclosed supplemental disclosures 63-68. The State filed a
2 15.6 motion related to the 65th supplemental disclosure (Desert Ridge Golf Receipts and
3 evidence regarding a recovered cell phone) on May 18, 2010. On May 28, the Court
4 granted the State's motion for additional time to make disclosure with respect to the
5 requested evidence. The State filed a notice and an affidavit, with no motion, on June 1,
6 2010, regarding the 67th and 68th Supplemental disclosures relating to ballistics testing
7 on Jim Knapp and DPS Corrective Action Logs. The State indicated it would only be
8 using this information in rebuttal. On June 3, 2010, the Court ruled that the State could
9 use this evidence only in rebuttal. The State has not moved and pursuant to Rule 15.6
10 will not be permitted to use any evidence from the 63d (April 28), 64th, or 66th,
11 supplemental disclosures.

12 **CONCLUSION**

13 Defendant Steven DeMocker, by and through counsel, hereby requests that this
14 Court prohibit the State from offering testimony from the late disclosed witnesses or
15 from introducing late disclosed evidence disclosed in violation of Rule 15.6(c) and (d)
16 and this Court's prior orders.

17
18 DATED this 8th day of July, 2010.

19
20 By: 

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27 Attorneys for Defendant

1
2 **ORIGINAL** of the foregoing hand delivered for
3 filing this 8th day of July, 2010, with:

4 Jeanne Hicks
5 Clerk of the Court
6 Yavapai County Superior Court
7 120 S. Cortez
8 Prescott, AZ 86303

8 **COPIES** of the foregoing hand delivered this
9 this 8th day of July, 2010, to:

10 The Hon. Warren R. Darrow
11 Judge Pro Tem B
12 120 S. Cortez
13 Prescott, AZ 86303

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